

The opinion in support of the decision being entered today was **not** written for publication and is **not** binding precedent of the Board.

Paper No. 30

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte RICHARD F. BAILEY Sr., RONALD A. FISHER
and STEVEN M. HOFFBERG

Appeal No. 2004-0251
Application 09/853,097

HEARD: January 6, 2004

Before COHEN, FRANKFORT, and PATE, Administrative Patent Judges.
FRANKFORT, Administrative Patent Judge.

ON REQUEST FOR REHEARING

This is in response to appellant's request for rehearing of our decision mailed February 26, 2004, wherein we affirmed, *inter alia*, the examiner's rejection of claims 127 through 130, 134, 137, 138 and 143 under 35 U.S.C. § 102(b) as being anticipated by Gross, and that of claims 68, 69, 72 through 75, 127 through 130, 134, 137, 138 and 143 under 35 U.S.C. § 102(e) as being

anticipated by Demon. In the request, appellant has particularly focused the arguments on our affirmance of the examiner's rejection of claims 127 and 129 as being anticipated by Gross or Demon, and claim 68 as being anticipated by Demon.

We have carefully considered each of the points of argument raised by appellant in the request for rehearing, however, those arguments do not persuade us that our merits based determinations on patentability regarding claims 68, 127 and 129 were in error in any respect. Claims 68, 127, and 129 read as follows:

68. An article of footwear, comprising a bladder having a pressurized fluid therein, a dynamic response chamber, and a control for controlling a dynamic flow of pressurized fluid between said bladder and said dynamic response chamber caused by transient forces, wherein said flow of pressurized fluid is dependent on a state of said dynamic response chamber.

127. A dynamically controlled footwear system, comprising:

(a) an enclosed space having a wall, said wall communicating forces with a wearer's foot; and

(b) a control system for separately controlling a static and dynamic characteristic of said enclosed space.

129. The system according to claim 127, wherein said static characteristic corresponds to a tension of the enclosed space wall and said dynamic characteristic corresponds to an effective damping of forces in the wall of the enclosed space.

Appellant's main point of argument regarding claims 127 and 129 centers on this panel's determination that the dynamically controlled footwear systems of Gross and Demon each include "a control system for separately controlling a static and dynamic characteristic of said enclosed space," as set forth in claim 127 on appeal. More specifically, appellant urges that we have incorrectly determined that the control systems of Gross and Demon provide separate control of a static and dynamic characteristic because the separate control recitation in claim 127 mandates that the control system "exercises simultaneous control over two independent characteristics of the footwear" (request, page 4) and thus permits a plurality of characteristics to be controlled at any time, while the control systems of Gross and Demon only control a single variable or characteristic in a time-dependent manner.

We remain committed to the views expressed on pages 32-40 of our earlier decision that the footwear systems of Gross and Demon each include a control system for separately controlling a static and dynamic characteristic of an enclosed space or bladder of the footwear therein, albeit in a time-dependent manner, so that control is exercised over a static characteristic first and

subsequently over a dynamic characteristic of the enclosed space/bladder. Appellant's assertion that the broad language of claim 127 requires simultaneous control over two independent characteristics of the footwear, and that such characteristics must be controllable at any time, attempts to read too much of the specification into the claim, and is simply beyond the broadest reasonable interpretation of the disputed language in claim 127.¹

On page 8 of the request, appellant asserts that control of relief pressure and cushioning effected by control of the flow rate of water from a bladder (205) in Demon's footwear does not correspond to damping. We do not agree. As noted in column 4, lines 11-13, the fluid valve (210) associated with each of the fluid bladders in the footwear of Demon is adjustable over a range of openings (i.e., variable metering) to control the flow of fluid exiting a fluid bladder, which release of fluid from the bladders reduces the impact of the user's foot upon the traveling

¹While appellant has indicated, on page 3 of the request, that chapters 1 and 17 of Elements of Computer Process Control were provided with the request, we note that no such documents were attached when the request was Faxed to the USPTO on April 26, 2004.

surface and, as indicated at column 5, lines 22-38, of Demon, allows the fluid bladder to deform (as shown in Fig. 4B) and thereby lessens the "push back" of the bladder. From our perspective, controllably opening the valve (210) to alter and lessen "push back" of a bladder (205) in Demon's footwear during user activity provides control over a dynamic characteristic of the enclosed space or bladder and corresponds to an effective damping of forces in the wall of the enclosed space/bladder, as broadly set forth in claim 129 on appeal.

As for appellant's assertions concerning claim 68, we remain of the view set forth on pages 35-37 of our earlier decision. Contrary to appellant's contention on page 8 of the request, Demon, column 5, lines 46-51, appears to distinguish between the fluid bladder (205) and the fluid reservoir (207), noting that both the size of the fluid bladder (205) and "the pressure exerted by fluid in the fluid reservoir" bear on the size of the opening of the fluid regulator (210). However, even if the "fluid reservoir" in this particular passage of the Demon patent actually references the "fluid bladder" (205), our view with regard to claim 68 and the water embodiment of Demon's dynamically controlled footwear does not change.

Appellant's further comments about "vacuum" in the bladders (205) of Demon and the reservoir (207) therein being at atmospheric pressure, relate to the "air" embodiment of the footwear in Demon, not the water embodiment relied upon by the examiner and this Board in the affirmed rejection of claim 68. In the embodiment of Demon where water is the desired pressurizing medium (col. 6, lines 27-32), the bladders (205) will clearly not be dependent upon a vacuum therein to return to their original size and shape (e.g., Fig. 4A) when the shoe is in use, but not in contact with the traveling surface. Moreover, the reservoir (207) will not be at atmospheric pressure, especially during an activity where the user is running or walking and subjecting the bladders (205) to forces increasing the pressure therein to beyond the set threshold, thereby requiring a measured opening of the valve (210) to release fluid (water) from the bladder at a controlled rate to its associated reservoir or dynamic response chamber (207). Under these conditions, where the shoe sole (10) and bladders (205) therein deform upon the application of force as the user's foot impacts traveling surface (15), as seen in Figure 4B of Demon, it is self-evident that water flowing from a bladder (205) to its reservoir (207) will increase the pressure in the reservoir and

thereby make further flow of pressurized fluid from the bladder (205) to the reservoir (207) dependent upon a state (i.e., pressure) of the reservoir or dynamic response chamber (207). When the shoe is not in contact with the traveling surface, such as when the user's foot is in its upward or downward motion during running or walking, and the forces are thus removed from the shoe sole (10) and bladders (205), the pressurized fluid (water) in the reservoir (207) associated with each bladder (205) will be returned to its bladder, thereby returning the bladder to its original size and shape (e.g., Fig. 4A), at which time control system (300) again closes valve (210) in preparation for the next impact of the user's foot with the traveling surface.

Regarding appellant's comments concerning "accidental anticipation," we stand by our determination on pages 37-38 of our earlier decision, that the doctrine of accidental anticipation is inapposite in this case.

In light of the foregoing, appellant's request is granted to the extent of reconsidering our decision, but is denied with respect to making any changes therein.

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No time period for taking any subsequent action in
connection with this appeal may be extended under 37 CFR
§ 1.136(a).

DENIED

IRWIN CHARLES COHEN)	
Administrative Patent Judge)	
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)	BOARD OF PATENT
CHARLES E. FRANKFORT)	
Administrative Patent Judge)	APPEALS AND
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)	INTERFERENCES
)	
WILLIAM F. PATE III)	
Administrative Patent Judge)	

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Milde, Hoffberg & Macklin, LLP
Counselors In Intellectual Property Law
10 Bank Street, Suite 460
White Plains, NY 10606